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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Children's Television Obligations	)	MM Docket No. 00-167
of Digital Television Broadcasters	)	

COMMENTS OF VIACOM INC.

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Summary

Viacom is among the nation's leaders in the provision of quality programming and related services for children. We have carried forward our strong commitment to children across many distribution platforms: through weekly distribution of many hours of children's quality entertainment and core-type programming on our Nickelodeon cable channels, including Nickelodeon, Nickelodeon GAS Games and Sports for Kids, and the joint venture Noggin (an innovative commercial-free educational service that can be accessed either through the Internet or television); through the weekly broadcast of quality core programming on Viacom's CBS Owned television stations; and through the development of a cluster of websites, each specifically designed to coordinate with and enhance the value of the various Nickelodeon cable channels' children's programming.

In this Notice, the Commission presents for consideration a far reaching set of proposed new regulations for children's programming that would have the effect of punishing our efforts on behalf of children and creating disincentives to experiment with new services for both children specifically and the public generally. Many of the proposed restrictions would hinder our ability to sustain and build children's programming services (including interactive services), deny children access to valuable material and information, and damage the economic viability of a variety of quality children programs and services. Others would impose burdensome new programming requirements and stifle innovation in the development of digital television services.

Just the list of new regulations contemplated in the Notice is staggering. In the course of the Notice, the Commission entertains proposals to impose children's programming obligations on digital broadcasters' multicast signals and on their ancillary

and supplementary services; to increase the programming obligations on broadcasters' primary signals; to limit the permissible number of preemptions of core programs; to regulate the efforts broadcasters must make to reschedule and to promote rescheduled children's programs; to terminate the exemption from rescheduling obligations for breaking news preemptions; to prohibit future interactive links between children's programs and Internet websites; to expand the definition of "commercial matter" in children's programming to include program promotions, public service announcements and sponsored educational and informational material; to require the rating and regulation of promotions in children's programming; to require the airing of promotions of children's programming during prime time or other day parts; and to require public service announcements about the value of educational and informational programming and the meaning of the E/I icon. As this litany makes clear, the breadth and scope of these unprecedented proposals is breathtaking.

To justify engagement in such an extensive round of new regulation, one would expect the presentation of compelling evidence of serious problems in need of correction. Yet, in connection with proposal after the proposal, the record is devoid of evidence that the interests of children are being harmed or neglected. To the contrary, the existing factual record in every case reflects that children are being well served currently. There is no dearth of educational and informational programming for children now. In most markets, commercial broadcasters provide an average of 18 or more hours of educational programming per week. These hours are supplemented by many more broadcast by noncommercial stations and cablecast by children's programming services such as Nickelodeon. The suggestions by some advocates that sufficient educational

programming is not available and that it is necessary to impose new programming requirements on multicasters, and on suppliers of ancillary and supplementary services, are manifestly without foundation.

Similarly, there are no grounds for concluding that children's programming is frequently preempted. The Commission's own estimates reflect reasonable, low rates of preemptions, and it is clear that the overall rates of preemptions for broadcast licensees are far lower than the Commission's own estimates. The factual record also demonstrates preempted children's programs are rescheduled and promoted, and there is therefore no basis for promulgating regulations to govern these practices. The record is also clear that broadcasters effectively and efficiently promote their children's schedules. There is no justification – or statutory authority – for the Commission to require promotions of children's programs in prime time or other dayparts, or to require broadcast announcements on the value of educational programming or the meaning of the E/I icon.

As stated in the Notice, certain advocates suggest that potential future direct interactive links between television programming and the Internet may be harmful to children, and that promotional material and public service messages should be deemed commercial matter, apparently on the grounds that these forms of programming are not valuable to children and that children's programs are not long enough. These positions, too, are utterly without foundation.

While as yet undeveloped, direct interactive links between children's programming and the Internet hold great potential for enhancing the value of children's entertainment and educational programming, as existing coordination of content between Nickelodeon programming and websites makes clear. Prohibiting such links at this early

stage of the development of interactive children's television services will hamper the creation of such services, and deny children access to valuable entertainment and educational material.

The proposals to expand the definition of commercial matter in children's programming similarly ignore critical facts. Perhaps conceived with broadcasters in mind, the proposals to define promotions, public service announcements and sponsored educational material as commercial matter would have a disproportionate and devastating effect on children's television channels, like Nickelodeon, whose entire program schedules are comprised of children's programming. Treating promotions as commercial matter – thereby forcing children's television programmers to limit those promotions or reduce the commercials that sustain the programming – would, in effect, prevent a children's programming network from promoting its schedule, as well as its network identity, at any time during its children's schedule. It is not possible to effectively build and sustain a children's programming network and schedule while being prohibited from promoting them. Similarly, forcing a children's network to air all its sponsored PSAs in the limited commercial time available (or to drop them from its schedule) would undermine the pro-social values and the economics of the network.

Beyond the lack of factual basis to support them, many of the proposals in the Notice are directly contrary to the letter and intent of federal law. In the 1996 Telecommunications Act, Congress made clear its intention that regulation of the telecommunications was to be reduced. It further mandated that the Commission was to facilitate the development of new technologies and encourage innovation aimed at bringing new digital services to the public. Imposition of new, affirmative children's

programming obligations on digital signals is highly regulatory and will stifle innovation in the nascent field of digital broadcast services. Placing requirements to broadcast children's programming on multicast signals will only threaten the chances for success of new programming channels. Imposing children's obligations on supplementary and ancillary services is flatly inconsistent with the regulatory scheme contemplated by the Telecommunications Act.

Likewise, other proposals are contrary to the intent of the Children's Television Act. The legislative history of the CTA specifically indicates that program promotions and public service announcements are not to be considered "commercial matter," and, consequently, the Commission has properly excluded these types of programming and air time sold to present educational and informational material from the definition of commercial matter under the statute. Proposals to now categorize these programming elements as commercial matter would violate the Act.

Finally, many of the proposals raised in the Notice are of doubtful constitutionality. As CBS Corporation argued, prior to its merger into Viacom, in response to the Commission's Notice of Inquiry in the matter of the public interest obligations of digital broadcasters, the theory of "spectrum scarcity" on which the regulation of broadcast content stands is becoming increasingly untenable. By expanding and extending the regulation of both broadcast and cable children's programming, the proposals under consideration here would strengthen the argument that the entire scheme of affirmative children's programming obligations is unconstitutional.

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Viacom Inc. ("Viacom") hereby respectfully submits its comments in response to the Commission's Notice of Proposed Rule Making ("*Notice*" or "*NPRM*") in the above-captioned proceeding, in which the Commission requests comment "on a range of issues related to the obligation of digital television ("DTV") broadcasters to serve children."[1]

I. Introduction.

Much as did the Commission's recent Notice of Inquiry in the matter of the public interest obligations of digital broadcasters, this NPRM contemplates imposition of new, burdensome regulations that are contrary to the deregulatory intent of the 1996 Telecommunications Act and damaging to the prospects of new digital television services. One of the overriding purposes of the Telecommunications Act is to reduce regulation so as to secure new and better services for the public and to speed the deployment of new technologies. Yet, as discussed below, the bulk of the proposals raised in the Notice would place significant burdens on the development of new services and make it considerably more difficult to find a workable economic model for bringing

[1] FCC 00-344 (released October 5, 2000).

new technologies and services to the public. In addition, in proposing to further restrict commercial matter during children's programming, the NPRM ignores the potentially devastating impact such proposals would have on cable- and satellite-delivered networks devoted primarily or exclusively to children, such as Viacom's Nickelodeon channels.

Viacom is a global media company, which reaches viewers and users across all distribution platforms, including broadcast television, cable- and satellite-delivered television and the Internet. Through affiliates, Viacom owns and operates the CBS and UPN broadcast networks and television stations affiliated with these networks, all of which broadcast core children's programming; basic cable program services, including the Nickelodeon cable channels; and premium cable program services.

The Nickelodeon cable channels consist of programming services devoted to quality programming for children aged two to fourteen, and include Nickelodeon, as well as Nickelodeon GAS Games and Sports for Kids and Noggin, a multi-media, commercial-free, 24 hour-a-day educational program service for children, created as a joint venture with the Sesame Workshop. The Nickelodeon channel itself offers a wide array of children's programming, from its pre-school daypart known as Nick Jr., geared to children ages two to five, to shows and programming blocks geared to older children ages six to fourteen. Six of Nickelodeon's Nick Jr. programs are also broadcast on the CBS Television Network as "core" programming. On the Internet, Viacom operates websites directed to children – Nick.com, Nickjr.com, Noggin.com, and GAS.nick.com – where children can interact with Internet content related to Nickelodeon pprogramming broadcast on television, as well as engage in stand-alone games and activities.

Nickelodeon's philosophy is to put children first and to help connect them to their world. This philosophy extends across all of Nickelodeon's channels and is reflected in Nickelodeon's public service campaigns and its network and program promotions, as well as in its programming, all of which seek to entertain and inspire children while instilling core network values of gender neutrality, diversity and nonviolence.

As this summary indicates, Viacom provides a great deal of children's programming and services over a variety of platforms. Adoption of the far-ranging proposals raised in the Notice would significantly and unnecessarily burden – and in some cases, severely damage – a number of these children's programming and other services delivered by different component parts of Viacom.

In Section II of these comments, we discuss the reasons why imposition of children's programming obligations to digital signals other than the broadcaster's primary signal would be premature, contrary to the intent of the Children's Television Act and the 1996 Telecommunications Act, and of doubtful constitutionality. In Section III, we review the factual record which demonstrates that there is no justification for the Commission to adopt rigid limits on the permissible number of preemptions of core programming, or to regulate the efforts licensees must make to reschedule and to promote rescheduled children's programs. In Section IV, we show that a prohibition on future direct interactive links between children's programs and Internet websites would unnecessarily burden the development of interactive children's television services and deny children access to material that enhances the entertainment and educational and informational value of the programs. We also demonstrate that an expansion of the definition of "commercial matter" to include public service announcements, promotions

and other sponsored matter having educational and informational value to children would be contrary to law, counterproductive to the goal of bringing valuable material to children, and damaging to the economics supporting quality children's programming. Finally, in Section V, we show that decisions about how to promote children's programming must be left to the discretion of broadcasters, both because they are in the best position to determine what may be efficient and effective, and also because the Commission is without statutory authority to intervene in this area.

II. Proposals for the Imposition of Requirements to Broadcast Educational and Informational Children's Programming on Digital Signals Other Than the Broadcasters' Primary Signal are Premature, Unjustified by Any Showing of Need, Likely to Inhibit the Growth of New Digital Services, Contrary to the Deregulatory Intent of the Telecommunications Act of 1996, and of Doubtful Constitutionality

In the Notice, the Commission concludes that "digital broadcasters are subject to all the [Children's Television Act's] commercial limits and educational and informational programming requirements."[2] Insofar as it goes, this proposition is clearly correct. There is no doubt that the Telecommunications Act of 1996 contemplates that digital broadcasters are not relieved of their existing obligations to serve the public interest.[3] Viacom in no way contests the applicability of the present regulations in the digital environment.

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2 *Notice* at ¶12.

3 "Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity." 47 U.S.C. §336(d). The Commission's current position is that "existing public interest requirements continue to apply to all broadcast licensees." *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MM Docket

But the critical question posed in this Notice is whether the Commission can or should now expand beyond current levels broadcasters' obligations to broadcast children's programming in the digital environment. Without itself endorsing specific proposals, the Commission asks whether its current processing guideline of three hours weekly should apply to only one digital programming stream, or to all of a broadcaster's digital programming streams. It further asks, assuming the guideline were not limited to the broadcaster's primary signal, whether it should apply only to free broadcast services or also to services offered for a fee.[4] The Commission goes on to request comment on a variety of specific proposals by advocacy groups that would require the broadcast of additional amounts of children's programming over and above the three hours now contemplated by the processing guideline. These proposals would not only impose new quantitative programming commitments on digital signals other than the broadcaster's primary one[5], but also add requirements to broadcast additional hours of children's programming on the primary signal over and above the current processing guideline.[6]

It is Viacom's view that the passage of the Telecommunications Act and the conversion to digital broadcasting provide no justification for the imposition of additional requirements to carry extra hours of children's programming on broadcasters' primary signals, or for the imposition of new programming burdens on secondary services that

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No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809, 12830, ¶50 (1997) (*"Fifth Report and Order"*).

4 *Notice* at ¶15.

5 *Notice* at ¶¶ 17-22.

6 *Notice* at ¶23.

broadcasters may seek to create, whether free or paid. To the contrary, Viacom believes that the Commission should adhere to the policy regarding the development of digital television which it articulated in the *Fifth Order and Report*: that, in order to foster the growth of innovative new services in a marketplace free of unnecessary regulatory constraints, it would avoid prescribing detailed requirements governing broadcasters' use of their digital channels. In the area of children's programming, we submit, this means applying the Commission's *present* license renewal guideline *only* to the one service which every digital licensee was required by the Commission to provide: that is, a free service with a resolution "comparable to or better than that of today's service" operating during the same hours as the broadcasters' current analog channel.[7]

Viacom, for one, has been hard at work attempting to fulfill the potential of digital broadcasting envisioned in the Telecommunications Act. It has vigorously pursued the buildout of digital television facilities in many large television markets, and its CBS Television Network has been a leader in the network distribution of high definition programming in an effort to accelerate the transition to a terrestrial digital television broadcasting system. Despite these efforts and the efforts of others in the broadcast industry, however, the fact remains that the transition is still at an early stage and faces enormous technological and marketplace uncertainty. Whether and how broadcasters can develop digital services that are technologically and economically viable is as yet unknown.

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[7] *Fifth Report and Order*, 12 FCC Rcd at 12820, ¶28.

Under these circumstances, it is critical that the Commission continue to permit broadcasters to respond to the demands of the marketplace with maximum flexibility. Intrusive and burdensome proposals such as those suggesting imposition of new, affirmative children's programming obligations are inconsistent with the Commission's consistent position that its priority at this crucial stage should be to facilitate, not hamstring, the digital transition. As aptly put by Commissioner Furchtgott-Roth in his separate statement to this NPRM, "it is counterintuitive that the Commission would now consider expanding the regulatory burden imposed on this nascent industry." Therefore, like Commissioner Powell, Viacom urges the Commission to recognize that it is "premature to attempt to fix public interest obligations to a service that has yet to blossom."

We also believe that the proposals for additional regulation of broadcast content in the Notice are of doubtful constitutionality. Viacom does not here challenge the existing structure of broadcast regulation. But, as discussed in detail in the comments of CBS Corporation ("CBS")[8] in response to the Notice of Inquiry, it is an inescapable fact that the constitutional premise underlying the regulation of broadcast content -- the theory of "spectrum scarcity" as articulated by the Supreme Court in its seminal decision in *Red Lion Broadcasting Co. v. FCC*[9]-- stands on increasingly precarious ground.[10] One need

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8 CBS has since merged with Viacom.

9 395 U.S. 367 (1969).

10 *See* Comments of CBS Corporation, MM. Docket No. 99-360, at 13-34 (March 27, 2000) ("*CBS NOI Comments*").

hardly look further in this regard than *Time Warner Entertainment Co. L.P. v. FCC*,[11] in which *one-half of the full membership* of the United States Court of Appeals for the District of Columbia Circuit not only argued that the *Red Lion* rationale should not be extended to justify content regulations imposed on DBS providers, but also expressed significant doubt as to the continued vitality of the spectrum scarcity theory "[e]ven in its heartland application" to broadcasting. With respect, therefore, we suggest that prudence counsels against the Commission's using the digital transition as an occasion for adopting new and more intrusive forms of content regulation which would clearly strain the limits of its constitutional authority.

A. The Children's Television Act Provides No Support For Expanding the Obligations of Digital Broadcasters To Carry Children's Programming

In the Notice, the Commission asks how it should interpret, in the context of digital broadcasting, the language of the Children's Television Act ("CTA") stating that licensees must serve the educational and informational needs of children "through the licensee's overall programming, including programming specifically designed to serve such needs."[12] In other words, the Commission asks whether this language provides justification for additional quantitative programming requirements on the non-primary signals of digital television broadcasters. It does not.

Passage of the Children's Television Act in 1990 preceded the conversion to digital broadcasting by a number of years, and there is no reason to believe that Congress

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11 93 F.3d 957 (D.C. Cir. 1996), *reh. en banc denied*, 105 F.3d 723 (1197).

12 47 U.S.C. §303b (emphasis added)

intended to require children's programming on non-primary digital signals by inclusion of the term "overall" in the CTA. This language does not suggest, much less mandate, that each and every one of a broadcaster's programming services, primary and secondary, free and subscription, general and specialized, must carry children's programming. Rather, as the legislative history of the Act clearly reflects, it means that each licensee's programming, *when viewed as a whole,* must serve children's' interests, an obligation which includes the presentation of some programming "specifically designed" to meet their educational and informational needs.

A brief review of the CTA's legislative history establishes beyond doubt that the "overall" language in the Act was merely intended to require the Commission at renewal to take account of both the licensee's core and non-core children's programming. In its analysis of the relevant section of the statute, the House Report states that, in reviewing license renewal applications, the statute requires the Commission to consider, among other things, "whether the licensee has served the educational and informational needs of children in its overall programming."[13] By way of explanation of this standard, the Report states:

> The Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to pass a license renewal review pursuant to this Section or any section of this legislation.
>
> The Committee believes that a broad range of programming will meet the standard of service to the child audience required by this Section. The Committee notes that general purpose programming can have an informative and educational

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[13] H.R. Rep.No. 385, 101st Cong., 1st Sess. at 17 ("*House Report*").

> impact [citation omitted] and thus can be relied upon by the broadcaster as contributing to meeting its obligation in this important area. The Committee would, of course, expect that stations will provide some programming intended primarily to serve the educational and informational needs of children. [] Under this legislation, the mix is left to the discretion of the broadcaster in this area, as in so many others.[14]

Thus the term "overall" simply means that non-core as well as core programming should be considered at renewal. The use of this term no more supports an interpretation that the CTA requires core programming to be included in more than one program stream, or in every program stream, offered by a digital licensee than it would a requirement that an analog television station present such programming in every daypart on its schedule. In fact, Congress's intent that core and non-core programming should both be viewed as contributing to the licensee's fulfillment of its obligation, and that the precise "mix" should be left to the licensee, supports at the least the conclusion that the Commission should not impose new obligations to carry core children's programming on non-primary digital signals. Indeed, it would be hardly frivolous to argue that it casts doubt on the validity of the Commission's quantitative license renewal guidelines altogether.

B. Requiring Broadcasters to Carry Core Children's Programming On Signals Other Than Their Primary Digital Broadcast Signals Would Be Inconsistent With The Intent And Language Of The Telecommunications Act

Imposition of core children's programming requirements on non-primary signals is also inconsistent with the overriding legislative purposes of the 1996 Telecommunications Act, and with the specific language of its provisions addressing

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[14] Id. See also S. Rep. No. 227, 101st Cong., 1st Sess. 22-23 (1989) ("*Senate Report*").

digital programming. As its preamble states, the Telecommunication Act is legislation designed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[15] As discussed below, adding burdensome requirements to broadcast core children programming on secondary broadcast signals and on ancillary and supplementary services is inconsistent with both these statutory goals -- reducing regulatory burdens and facilitating broadcasters' efforts to bring innovative services to the public.

1. Imposing New Affirmative Children's Programming Obligations on Secondary Programming Streams Will Stifle Experimentation and Unnecessarily Threaten the Chances for Success of Multicasting

As Congress, the Commission, and numerous commenters have noted, there is great potential public value in allowing broadcasters to experiment and innovate with new, free over-the-air programming through multiplexing. In part because the costs of developing such programming – and the general costs of the conversion to digital broadcasting – will be so high, it is unknown whether the provision of additional free programming will be profitable. To impose quantitative obligations to broadcast children's programming on these nascent programming services will create a significant disincentive to experiment with them and will stifle innovation.

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[15] Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996) (Emphasis added.)

Imposing children's programming requirements on secondary over-the-air programming services having a specialized focus other than children would unquestionably damage their chances of survival, and would not promote the public interest. For example, a business news or cooking channel is simply less likely to be launched or to survive if there is a requirement that it must include children's programming on its schedule. And children and their parents are not likely to tune into such niche services for core programming.

The presence of children's programming would be inconsistent with and disruptive of the overall programming goals of these services. Interruption of the intended programming in favor of children's fare would likely drive potential adult viewers away. In addition, few children would likely be attracted to programs presented in the environment of an adult-oriented service. Thus, not only would the services' efforts to build an adult audience be harmed, but also the children's programming would be virtually certain to attract little commercial support. Such a requirement, in short, would be nothing other than regulation for regulation's sake.

The possibility of the proliferation of new, specialized programming services in the digital environment is a reason for withholding programming obligations, not imposing them. To the extent a diverse universe of programming alternatives is allowed to flourish, programming that meets the interest and needs of a wide variety of viewers – including children – is more likely to find a niche. As the NAB correctly reasoned in its comments in response to the Notice of Inquiry on digital public interest obligations,[16] to

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[16] *Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360, 14 FCC Rcd 21633 (1999) ("*Public Interest Obligations NOI*").

the extent that multicasting increases programming options available to viewers, the Commission should be less concerned that each programming stream offer every category of public interest programming. As the experience of cable networks attests, specialized channels offering quality programming for children are as likely to succeed as business news or cooking channels. [17] However, digital broadcast services offering a counterpart to the rich diversity of cable networks which now cater to individual interests and tastes are unlikely to develop beneath the heavy hand of government regulation, demanding that they attempt to be something which they are not.

The view that preserving broadcasters' flexibility in their choice of multicast programming will well serve the public – including the child audience –is consistent with the general position the Commission has long held with regard to licensees' fulfillment of their public interest obligations. For example, in its Report and Order eliminating programming guidelines in 1984, the Commission expressed confidence that it was unnecessary to require all licensees to provide all categories of programming in order to ensure that the public would receive sufficient levels of informational, local and non-

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[17] No one should question the truth of this proposition in light of the success of Viacom's cable network Nickelodeon, which, as described in Section IV, *infra*, provides numerous hours weekly of quality core-type programming for children. This specialized cable network has flourished to such a degree that this year it is supplying the entirety of the CBS Television Network's high quality children's educational and informational schedule.

Viacom continues to pursue innovative approaches aimed at providing high quality educational programming to children, most recently through our joint venture with the Sesame Workshop to create Noggin, the commercial-free educational service that can be accessed either through the Internet (at Noggin.com) or through the Noggin television channel.

entertainment programming, because this goal would be accomplished by the mix of programming provided by licensees' exercising their discretion to respond to the marketplace:

> We believe that licensees should be given [] flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand. Such an approach not only permits more efficient competition among stations, but also poses no real risk to the availability of these types of programming on a market basis. This is particularly true in view of the continuing obligation of all licensees to contribute issue-responsive programming and their responsibility to ensure that the strongly felt needs of all significant segments of their communities are met by market stations collectively. The current guidelines, while failing to have a significant impact on overall station performance, tend to restrict the freedom of individual licensees by requiring them to present programming in all categories. Such a requirement is unnecessary and burdensome in light of overall market performance.[18]

In the current circumstances, there is no real risk to the availability of core children's programming that would be created by leaving broadcasters the flexibility to design secondary programming services as they choose, particularly in view of all broadcast licensees' continuing obligation to contribute core children's programming, consistent with the Commission's processing guidelines, on their primary digital channel.

There should be no mistaking that an obligation to broadcast children's programs on some or all program streams would significantly increase the intrusion into broadcasters' programming choices in terms of the sheer quantity of the requirement. The proposals made by various advocacy groups, which the Commission recounts in the Notice, would all place unprecedented new burdens on broadcasters. For example, one

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[18] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670, *Report and Order*, 98 FCC 2nd 1076, 1087-88 (1984) ("*Deregulation of Television*"), *recon. denied*, 104 FCC 2nd 358 (1986), *rev'd in part, ACT v. FCC*, 821 F. 2d 741 (D.C. Cir. 1987).

proposal would arbitrarily require multicasters to devote three percent of their programming time to core children's fare.[19] Another would more than double the current processing guideline to seven hours a week on broadcasters' primary signal.[20] The questionable constitutionality of such significant programming requirements,[21] as well as their inconsistency with the intent of the Telecommunications Act, compel their rejection.

While new services carrying educational and informational programming for children are likely to increase simply as a result of market forces in a multicast environment, the fact is that there is no evidence of a shortage of children's educational and informational programming now. Under the current regulatory scheme, virtually all broadcast licensees are each broadcasting three hours of children's educational and informational programming weekly. According to the Commission's own assessment, as of September 30, 2000, there were 1288 commercial broadcast stations in the United States.[22] This means that across the 210 television markets, there are an average of over six commercial broadcast stations per market, and an average of over 18 hours of core children's programming available on commercial stations per market each week. Since there are generally more broadcast stations in larger markets, well over 18 hours of core programming is available to most children. In virtually all television markets, these hours

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19 *Notice* at ¶17.

20 *Notice* at ¶23 and n. 51.

21 With regard to the constitutional frailties of quantitative programming obligations, we refer the Commission to the *CBS NOI Comments*, at 13-34, and 52-66.

22 *See www.fcc.gov/mmb/obc/fy2000st.txt.*

are supplemented by many additional weekly hours of children's educational programming broadcast by public television stations[23] and by cable channels such as the Nickelodeon channel and the multi-media channel Noggin. In short, the notion that additional programming requirements are needed because of a lack of available educational programming is a premise without factual support.[24]

The sound policies previously pursued by the Commission in implementing the Telecommunications Act also strongly support the view that at this nascent stage of the development of digital broadcasting broadcasters should be permitted to continue to fulfill their obligations to children on their primary broadcast signal under the existing regulations. As we pointed out in response to the *Public Interest Obligations NOI*, in implementing the Act, the Commission consistently has taken steps to ensure that it does not impose obligations on broadcasters that might hinder their ability to innovate and experiment with program offerings to the public. It was for this reason that the Commission declined to impose a requirement that broadcasters provide any minimum amount of high definition television programming, instead leaving the decision to the

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[23] According to the Commission's website, as of September 30, 2000, there were 375 educational television stations across the country. *Id.*

[24] The Notice also makes reference to a baseless argument for the imposition of new quantitative children's programming requirements offered by one advocacy group, which contends that "the current amount of three hours-per-week of core programming is insufficient in light of the added capacity multicasting offers." Notice at ¶ 21. The fact that multicasting adds additional programming capacity is irrelevant to the question of whether or not quality educational programming is now available to children. That some advocates wish to compel every over-the-air program service in America to reflect their personal preferences provides no regulatory, statutory or constitutional basis for government's imposing their will on the market.

discretion of the broadcaster.[25] Similarly, the Commission declined to adopt any requirement to simulcast in the early years of the transition to digital broadcasting.[26]

The same sound policy, rooted in the intent of the statute, dictates that broadcasters should be permitted to fulfill their public interest obligations to children on their primary broadcast channel. The simply reality is that digital broadcasting in general and multicasting in particular are still in their infancy, and there has not been nearly the development of these services that might justify abandonment of the position taken by the Commission in 1997 in its *Fifth Order and Report.* As it did at that time, the Commission should simply reiterate now that "broadcast licensees and the public are on notice that existing public interest requirements continue to apply to all broadcast

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[25] The Commission's stated reason for this decision was to:

> allow broadcasters the freedom to innovate and respond to the marketplace in developing the mix of services they will offer to the public. In this regard, we endeavor to carry out the premises of the 1996 Act which ... seeks "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"

Fifth Report and Order, 12 FCC Rcd at 12826, ¶41. The Commission further stated that it was not possible in this early stage of the digital era to know what service consumers might "demand and support," and, consequently, the more "prudent" course was to "leave the choice up to broadcasters so that they may respond to the demands of the marketplace," and avoid imposition of an HDTV minimum that could "stifle innovation." It concluded that "allowing broadcasters flexibility as to the services they provide will allow them to offer a mix of services that can promote increased consumer acceptance of digital television...." Id. at 12826-27, ¶42.

[26] Id. at 12832, ¶¶54 and 55. That decision also was premised on recognition of "the need to afford broadcasters flexibility to program their DTV channels to attract consumers," and to "give broadcasters the ability to experiment with program and service offerings." The Commission feared that "a simulcast requirement might limit broadcasters' ability to experiment with the full range of digital capabilities."